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FOREIGN BOYCOTTS AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1975

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 953

TOGETHER WITH

ADDITIONAL VIEWS

FEBRUARY 6, 1976.—Ordered to be printed

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FOREIGN BOYCOTTS AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1975

FEBRUARY 6, 1976.—Ordered to be printed

Mr. STEVENSON, from the Committee on Banking, Housing and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 953]

The Committee on Banking, Housing and Urban Affairs, to which were referred S. 953 to strengthen the anti-boycott provisions of the Export Administration Act of 1969, S. 425 (together with an amendment, to screen sizable foreign investments in the United States and expand the investor disclosure requirements of the Securities Exchange Act of 1934, and S. 995 to regulate investment by foreign governments in the United States, having considered the same, reports favorably on S. 953 with an amendment and an amendment to the title, and recommends its passage.

HISTORY OF THE BILL

S. 953 was introduced in the Senate by Senator Stevenson on March 5, 1975 and referred to the Committee. On July 22d and 23d, 1975, the International Finance Subcommittee held hearings on S. 953, S. 425, introduced by Senator Williams, S. 995, introduced by Senator Roth, and S. 1303, introduced by Senator Inouye on behalf of himself and others.[1]

The general subject of foreign investment in the United States had been reviewed in earlier hearings conducted by the International Fi-

[1] *Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs on Foreign Investment in the United States,* 94th Cong., 1st Sess. (1975).

nance Subcommittee in January and February of 1974.[2] S. 425 was similarly the subject of earlier hearings held by the Securities Subcommittee in March of 1975.[3]

S. 425 was subsequently referred to the International Finance Subcommittee for consideration along with S. 953. On November 7, 1975, the International Finance Subcommittee in open executive session agreed to recommend to the full Committee a composite bill containing features of S. 953 and S. 425 in Titles I and II, respectively, together with additions and modifications.

On December 17, 1975 the full Committee met in open executive session and agreed to report the Subcommittee's recommendations with amendments as S. 953.

Purpose of the Bill

The purpose of Title I of the bill is to strengthen United States law against foreign boycotts and to reduce their domestic impact. The purpose of Title II is to identify foreign ownership in U.S. corporations and to provide increased information on the identity and influence of U.S. corporate stockholders.

FOREIGN BOYCOTTS

Section 3(5) of the Export Administration Act of 1969 (the "Act") sets forth United States policy against foreign boycotts as follows: "It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States [and] (B) to encourage and request domestic concerns engaged in . . . export . . . to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting . . . [such] . . . restrictive trade practices or boycotts . . ." 50 U.S.C.A. App. § 2402(5) (Supp. 1975).

The Act provides for implementation of this policy by requiring that all domestic concerns receiving requests for the furnishing of information or the signing of agreements which have the effect of furthering or supporting a foreign boycott report this fact to the Secretary of Commerce for such action as he may deem appropriate. *Id.* § 2403(b)(1). This is the only measure specifically required under the present Act for carrying out U.S. anti-boycott policy. Implementation of that policy is otherwise left to the broad discretion of the President and the Secretary of Commerce.

Title I of S. 953, as reported by the Committee, would expand and strengthen the implementation of U.S. anti-boycott policy:

(1) It would require U.S. firms which receive a request to comply with a foreign boycott to disclose whether they intend to comply and have complied with such request;

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[2] *Hearings Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing, and Urban Affairs on Foreign Investment in the United States,* 93d Cong., 2d Sess., Pt. 1 (1974).

[3] *Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs on the Foreign Investment Act of 1975,* 94th Cong., 1st Sess. (1975).

(2) It would require that boycott reports which U.S. firms are required to file with the Department of Commerce hereafter be made public;[4]

(3) It would prohibit U.S. firms from furnishing any information regarding the race, religion, or national origin of its employees, shareholders, officers, or directors or those of any other U.S. company where such information is sought for purposes of enforcing a foreign boycott;

(4) It would prohibit U.S. firms from refusing to do business with other U.S. firms pursuant to a foreign boycott demand;

(5) It would increase the monetary penalties applicable under the Act from $1,000 to $10,000 and make it clear that existing law authorizes the suspension of export privileges for violations of the anti-boycott provisions of the Act;

(6) It would require public disclosure of Commerce Department charging letters or other documents initiating proceedings against U.S. companies for failing to comply with the anti-boycott provisions of the Act;

(7) It would require the Commerce Department to provide the State Department with periodic reports on the information contained in the boycott reports filed by U.S. firms;

(8) It would require that the Commerce Department's semi-annual reports to Congress under the Act include an accounting of all action taken by the President and Secretary of Commerce to effect the anti-boycott policy of the Act; and

(9) It would make it clear that the Act applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies as well as all other domestic concerns.

INVESTMENT DISCLOSURE

Under section 13(d) of the Securities Exchange Act of 1934, (the "Exchange Act") [15 U.S.C.A. § 78 m (1971)] generally any person who acquires the beneficial ownership of more than 5% of any equity security of a U.S. company subject to the Act must file with the Securities and Exchange Commission ("SEC") a statement disclosing, among other things, the background and identity of the persons on whose behalf the securities have been purchased, the source and amount of the funds used in making the purchase, any plans the purchaser may have to liquidate, merge, dispose of the assets of, or make major changes in the business of the company, the number of other shares the purchaser has a right to acquire, and any arrangements the purchaser may have with respect to the exercise of any rights relating to such securities.

Title II of S. 953, as reported by the Committee, would amend Section 13(d) of the Exchange Act to expand the disclosure requirements thereunder to include disclosure of the following additional information:

(a) the residence, nationality, and nature of the beneficial ownership of the person acquiring the securities; and

[4] However, commercial information regarding the value, kind, and quantity of goods involved in any reported transaction could be kept confidential if the Secretary of Commerce determines that disclosure of such information would put the domestic concern involved at a competitive disadvantage.

(b) the background and nationality of each associate of the purchaser who has a right to acquire additional shares of the issuer.

In addition, Title II would impose new disclosure requirements as follows:

Every holder of record of, and any other person having an interest in, 2% or more of any equity security of a U.S. company subject to that described in section 13(d)(1) of the Exchange Act would be required to file reports as prescribed by the SEC at such time, with such persons, and containing such information as the SEC may require. The SEC would have authority to make exceptions not inconsistent with the public interest or the protection of investors.

The 2% threshold would be reduced to 1% on September 1, 1976 and to ½ of 1% on September 1, 1977. However, the SEC could accelerate or defer such dates or grant exemptions from these disclosure requirements if, after public comment, it concluded that such change or exemption was not inconsistent with the public interest or the protection of investors.

The purpose of these provisions is to provide a means of identifying the extent of foreign ownership in U.S. corporations and, to a greater degree than in the past, the acquisition of potentially controlling interests in such corporations by foreign as well as domestic interests. Broad discretion is left to the SEC to permit it to tailor specific reporting requirements to the objectives sought to be achieved by the legislation.

In addition, in deciding whether to change the dates specified for the new reporting thresholds, the SEC is to consider and receive public comment on such matters as the extent to which beneficial owners avoid reporting requirements by using multiple holders of record; the cost of compliance to issuers and record holders; the effect on the securities markets; the benefits of such information to investors and the public; the interests of individuals in the privacy of their financial affairs; the extent to which the required disclosures would give someone an undue advantage in connection with the acquisition of securities through tender offers or otherwise; and the need for the required disclosures for purposes of administering and enforcing other provisions of the Exchange Act.

The SEC is to report to Congress on August 1, 1976 and again on August 1, 1977 on its implementation of the new reporting thresholds. No later than January 2, 1978, the SEC is to report to the Congress on the feasibility and desirability of reducing the reporting threshold further to one-tenth of one percent.

Need For the Legislation

Title I of this legislation is needed in order to provide an effective means of enforcing U.S. policy against foreign boycotts and to mitigate their domestic impact.

Title II of the legislation is needed in order to provide a systematic mechanism for monitoring the acquisition of controlling or potentially controlling interests in U.S. companies by foreign as well as domestic interests.

(a) *The Domestic Impact.* The need for Title I of the bill is demonstrated by the growing domestic impact of the Arab boycott against Israel. While the boycott has been in effect since 1946, its impact on U.S. firms has recently begun to assume significantly greater proportions than in the past, and it promises to grow in the future unless action is taken.

For example, in 1974, 785 U.S. export transactions involved an Arab boycott demand according to reports filed by U.S. firms with the Department of Commerce. However, for the first three quarters of 1975 alone, the number of such transactions jumped to 7,545, or almost ten times the number for all of 1974.[5] Twenty-three U.S. firms reported receipt of Arab boycott demands in 1974. During the first three quarters of 1975 alone the number jumped to 538, more than twenty-three times the number for all of 1974.[6] Estimates by the Department of Commerce indicate that the dollar value of goods involved in boycott-affected transactions in 1974 was $9.9 million. During the first half of 1975, the dollar value of such transactions climbed to over $203 million, more than twenty times the value for all of 1974.[7]

The increase in boycott demands by the Arab states reflects increased political tension in the Middle East and the dramatically enhanced economic power of the oil producing states since the oil embargo of 1973. Increased petroleum prices and the accumulation of billions in oil earnings have significantly changed the dimensions of the boycott. Its power and reach promise to grow as trade and investment with the West expand. As they do, the pressure on U.S. firms to comply with the boycott if they wish to do business with the Arab states will undoubtedly grow as well.

Already there is substantial evidence of acquiesence to that pressure. In reports filed with the Department of Commerce for the third quarter of 1975. U.S. firms indicated that they intended to comply with Arab boycott demands in over 63% of their export transactions.[8] During 1974, the value of U.S. exports shipped in compliance with boycott demands stood at a little over $9.3 million. By the end of the first six months of 1975 the value of exports shipped in compliance with boycott demands had already reached $9.2 million, or just about the same level as for all of 1974.[9]

Several cases brought to to attention of the Committee illustrate how the boycott affects business relations within the United States. One involved a U.S. company's contract to supply buses to an Arab state. As told to the Committee, after the bus manufacturer placed an order with one of its suppliers to supply seats for the buses, it was advised that the supplier was on the Arab blacklist and that, as a consequence, buses incorporating seats made by the supplier would not

[5] Figures for 1974 and the first quarter of 1975 appear in U.S. Department of Commerce. Export Administration Report 17 (1st Quarter 1975). Figures for the second and third quarters of 1975 are not yet published but were supplied to the Committee by the Department of Commerce.

[6] *Id.*

[7] Letter from Under Secretary of Commerce John K. Tabor to Senator Williams, June 25, 1975.

[8] Unpublished data supplied to the Committee by the Department of Commerce.

[9] Letter to Senator Williams, *supra* note 7.

be acceptable. The manufacturer's order with its supplier was subsequently terminated.

Another case brought to the Committee's attention illustrates the racial as well as political dimensions of the boycott. In that case Belvedere Products, Inc., a U.S. company and former subsidiary of the Revlon Company, discovered that it was on the Arab boycott list. It wrote to the League of Arab States asking what steps were necessary to secure its removal from the list. In response, the Arab League advised Belvedere that it would consider removing the company from the list if, among other things, it supplied a statement of the names and *nationalities* of its shareholders and directors. In addition, Belvedere was required to disclose whether it had any business dealings with its former parent, Revlon, a blacklisted company, the implication being that such dealings were prohibited.

In another case, Allied Van Lines International, according to testimony, distributed a brochure to potential customers regarding customs matters in various countries around the world. Under the heading "Arabian Countries," the brochure stated that "Shippers must check with the consulate for approval of items to be brought into this country. Items produced in Israel or *by Jewish firms or associates throughout the world are blacklisted.*" Emphasis supplied. The implication that Allied would not ship the products of *Jewish*, not necessarily Israeli, firms to Arab states was clear.

In all three cases, the boycott directly and adversely affected or potentially affected the ability of firms operating in the United States to do business with each other.

Over 1500 U.S. concerns are on the blacklist maintained by the League of Arab States. Firms on that list may not do business with the Arab states. More importantly for present purposes, other U.S. firms may not do business with blacklisted firms if they wish to do business with the Arab states. U.S. firms are thus put in the position of discriminating against other U.S. firms pursuant to the dictates of foreign governments.

(b) *Enforcement of U.S. Policy.* Despite the fact that it is explicit U.S. policy under existing law to oppose foreign boycotts, implementation of that policy has been largely weak and ineffective. With a few recent exceptions,[10] the only measure taken has been the statutorily mandated one of requiring U.S. firms to file reports with the Department of Commerce upon receipt of a foreign boycott demand.

However, as late as the summer of 1975, Commerce Department report forms volunteered the advice that U.S. firms are "not legally

[10] On November 20, 1975, after the International Finance Subcommittee recommended the subject legislation to the full Committee, the White House announced that it was taking a number of measures in response to discrimination against Americans on the basis of race, color, religion, national origin or sex that might arise from foreign boycott practices. Among other things, the Secretary of Commerce was directed to amend the Export Administration Act regulations (i) to prohibit U.S. exporters from answering or complying with boycott requests which would cause discrimination against U.S. citizens on the basis of race, color, religion, sex, or national origin and (ii) to require banks, insurers, freight forwarders, and shipping companies which become involved in any boycott request to report such involvement to the Department of Commerce. In addition, reporting on compliance intentions has now been made mandatory. To the extent that there is overlap between the Administration's action and S. 953, the latter would support such action by giving it an express statutory base even though present legal authority is adequate to support action taken by the Administration to date. Recently, the Justice Department announced legal action under the Sherman Act against a major U.S. company for certain actions in compliance with the Arab boycott. The infrequency of such legal action against firms complying with the Arab boycott demonstrates the need for additional legislation.

prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts." And while those report forms asked U.S. firms to indicate whether they intended to comply with the boycott, they also pointed out that "[c]ompletion of the information in this Item would be helpful to the U.S. government *but is not mandatory.*" (Emphasis supplied.)[11] While neither statement was itself inaccurate, its appearance in an official U.S. government form did little to convey an impression of vigorous U.S. opposition to the boycott.

Moreover, enforcement activities were such that not until Congressional hearings in 1975 turned the spotlight on the Arab boycott and its growing domestic impact had any U.S. firms been penalized for failing to comply with even these limited reporting requirements. Even then, as of June 27, 1975, the Commerce Department sought to impose penalties against only five of the 105 firms found to be in violation of the Act. Four of the five were each penalized $1,000, and the remaining 100 were merely warned to comply with the law henceforth.[12]

(c) *Inadequacy of Existing Law.* Existing U.S. law is inadequate to deal with the problem. According to testimony by the Justice Department, "[w]ith limited exceptions, none of which have significant application to the present problem, Federal civil rights laws do not prohibit private discrimination in the selection of contractors or the treatment of customers." [13]

According to the same testimony, the Sherman Act is the only Federal anti-trust statute having significant application to compliance with foreign boycotts, and there are serious impediments to its use.[14]

Among the impediments cited are (1) the "distinctive purpose" of the boycott, which exists for political reasons rather than for the purpose of securing commercial advantage; (2) the uncertainty of the economic impact and hence whether it is "so certain or severe as to justify application of the per se rule of illegality applied domestically;" (3) special legal considerations, such as the doctrine which precludes a sovereign state from being made a defendant in the courts of another, the "act of state doctrine" which bars U.S. courts from examining the validity of acts performed by sovereign states within their own territory, and the doctrine of "foreign governmental compulsion" which holds that a defendant "will not ordinarily be subject to sanction in one jurisdiction for acts performed in another jurisdiction under pain of sanction by the latter." [15]

As a consequence, according to the Justice Department, "it has never been held that a foreign, politically motivated boycott of this sort violates the [Sherman] Act." [16] Of significance, too, is the Department's conclusion that while an express agreement by a U.S. company

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[11] U.S. Department of Commerce Form DIB–621 (Rev. 4–73).
[12] As of June 1975, the case against the fifth had not yet been resolved, U.S. Department of Commerce, *Export Administration Report* 17 n. 1 (1st Quarter 1975).
[13] *Hearings on Foreign Investment and Arab Boycott Legislation, supra* note 1, at 166.
[14] *Ibid.*
[15] *Id.* at 166–67.
[16] *Id.* at 167.

to refrain from doing business with other U.S. companies might be "suspect," a unilateral refusal to deal "is not itself a violation." [17]

(d) *Multidimensional Character of the Arab Boycott.* The Arab boycott takes a number of different forms. In its simplest form, Arab governments refuse to have, and prohibit their nationals from having, economic relations with the State of Israel. That is the classic case of a primary boycott.

In its secondary aspect, the boycott extends its reach by attempting to interfere with economic relations between third parties and the State of Israel as a means of implementing the primary boycott. Thus, U.S. companies might be required to refrain from doing business with Israel or with Israeli companies or nationals as a condition of doing business with the Arab states.

In its tertiary aspect, the boycott extends its reach still further by attempting to interfere with economic relations among third parties themselves. Thus, a U.S. company might be required to refuse to do business with other companies which have economic relations with Israel, have Jewish ownership, management, or employees, or which for any other reason are on the blacklist.

(e) *The Legislative Response.* The Committee recognizes that the Arab states regard their boycott efforts as part of their continuing struggle against Israel. The Committee also recognizes that the use of economic measures as a weapon in the Middle East struggle is likely to continue until there is a permanent political settlement. The Committee is aware that primary boycotts are a common, although regrettable, form of international conflict and that there are severe limitations on the ability of outside parties to bring such boycotts to an end. However, the Committee strongly believes that the United Staes should not acquiesce in attempts by foreign governments through secondary and tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. Accordingly, the bill reported by the Committee directly attacks attempts to interfere with American internal affairs while creating mechanisms for more subtle and flexible pressure against the other dimensions of foreign boycotts.

1. Reports on Compliance

By *requiring* that U.S. firms disclose whether they intend to comply, and whether they have complied, with foreign boycott demands, the bill would give the Government a basis for accurately assessing the nature and extent of compliance with foreign boycotts and their economic impact on the United States. Accurate data is essential to sound policy. Experience has shown that where reports on compliance are optional, an overwhelming proportion choose not to supply the information.

For example, U.S. firms refused to disclose whether they intended to comply with Arab boycott demands in over twenty-two thousand of the reported twenty-three thousand 1972 export transactions involving an Arab boycott demand. Similarly, in 1973 U.S. firms refused to disclose their compliance intentions in over ten thousand of the reported eleven thousand export transactions involving a boycott demand. Through the third quarter of 1975, the most recent period for

[17] *Ibid.*

which data are available, in over three thousand of the reported seven thousand export transactions involving a boycott demand, U.S. firms refused to disclose whether they intended to comply.[18] As a result, valuable information about the extent and impact of the boycott was lost. Mandatory reporting of such information would fill an important gap in available data.

2. Public Disclosure

By requiring that future boycott reports filed by U.S. firms be made public, the bill would give the public and the Congress an opportunity to monitor the behavior of U.S. business and the effectiveness of measures taken by the Government to implement U.S. anti-boycott policy. At the same time it would interject an element of public accountability in the responses of U.S. firms to boycott demands.

Presently, U.S. firms are free to comply with such demands without risking public scrutiny or the imposition of sanctions despite U.S. policy in opposition to such activity. Because their actions are cloaked in secrecy, the public and the Congress are deprived of an opportunity to know the degree to which U.S. business relations are being bent to the interests of foreign governments. Because they can comply with the boycott without telling the public, U.S. business need not give consideration to potential public disapproval of their actions. And because the Secretary of Commerce has repeatedly refused to make boycott reports available to the Congress, the opportunity to fashion appropriate legislative responses and to conduct effective oversight is seriously impaired.

The Committee is sensitive to the concern that public disclosure could subject U.S. firms to harassment by private interests opposed to the Arab boycott. However, in weighing the alternatives for increasing the effectiveness of U.S. anti-boycott policy, including a flat prohibition on all forms of compliance, the Committee concluded that the potential adverse consequences were minimal and, in any event, were far outweighed by the potential public benefits.

For one thing, only firms which comply with the boycott risk adverse public reaction. Those which refuse stand to enjoy the benefits of public approval. For another, it is unlikely that the reaction to compliance will be adverse in every case; instead it will depend on the nature of compliance. In some instances, such as a certification that goods to be shipped to an Arab state are not of Israeli origin, it will undoubtedly be recognized that no direct harm to domestic U.S. interests ensues and that such certification is an aspect of the primary boycott over which the U.S. has little control. In any event, the possibility of adverse reaction is not sufficient reason for withholding important information regarding corporate activities from the public. The whole thrust of U.S. securities laws since the 1930's has been public disclosure regardless of whether disclosure may reflect badly on corporate behavior. So there is ample precedent.

But whatever the reaction, public disclosure would cause U.S. businesses to weigh public policy carefully in their decision-making processes. Firms would still be free to comply with certain boycott demands but not without regard to overall U.S. interests. The bill would

[18] U.S. Department of Commerce, *Export Administration Report* 19 (1st Quarter 1975). Figures for the second and third quarters of 1975 are not yet published but were supplied to the Committee by the Department of Commerce.

thus provide an incentive for conforming private behavior to public policy without compelling it and would, in addition, create an environment which would help U.S. firms stand-up to foreign pressure.

As noted, the Committee was urged by some to ban any and all forms of compliance with the boycott. It concluded, however, that such a ban would be unfair to many U.S. firms, would be of little benefit to the United States, and would deprive the President of desirable flexibility in the conduct of U.S. foreign policy.

As absolute prohibition against compliance with foreign boycotts would be tantamount to a counter-boycott. For example, if one country conditions U.S. business relations with it on a refusal to do business with another, U.S. firms could not lawfully comply with those terms. If a firm did do business with the boycotting country but not with the other, it would run the risk of apparent compliance with the boycott, regardless of the reasons why it had no business relations with the boycotted country.

A firm may simply have no business opportunities or interest in that country. Yet on its face, its behavior would be indistinguishable from compliance with the boycott. Rather than risk being charged with compliance, many would undoubtedly choose to terminate business relations with the boycotting country or refrain from developing them in the first place. The result would be a counter-boycott.

In the present context, such a policy would deprive U.S. firms which have no business opportunities or interest in Israel of legitimate business opportunities in the Arab states. Others might simply source their sales to the Arab states from foreign subsidiaries in order to circumvent U.S. law. In any event, U.S. trade relations would be severely impaired without any corresponding benefit to the United States. The termination of U.S. business relations with the Arab states is a weak reed for attempting to end the long-standing boycott against Israel. Other avenues, including progress toward an overall settlement of the Middle East question, offer more promise.

For these reasons, the Committee has focused its efforts on creating public accountability and an environment for resisting boycott demands while recommending specific prohibitions only on attempts to interfere with relations among U.S. citizens and other repugnant dimensions of foreign boycotts.

3. Refusing To Do Business and Supplying Information Regarding Race, Religion, or National Origin Pursuant to Boycott Demands

By prohibiting U.S. firms from refusing to do business with other U.S. firms pursuant to boycott demands, and by prohibiting U.S. firms from furnishing information regarding the race, religion, or national origin of any employee, shareholder, officer or director of their own or any other U.S. company pursuant to a boycott request, S. 953 would address the most repugnant dimensions of the boycott.

In the case of a primary boycott, one country terminates its economic relations with another in order to achieve certain foreign policy objectives.

With a primary boycott, the boycotting country bears the burden of disrupted economic relations. However, where the boycotting country extends the boycott to third parties, the matter has a direct and immediate impact on others not directly involved in the dispute. Their own policies and interests become directly engaged and their freedom

of action, circumscribed. Where interference with third party relations as racial or religious overtones, the challenge strikes at fundamental U.S. social and legal principles.

Because of the growing domestic impact of the Arab boycott and the impediments to legal action against its secondary and tertiary dimensions, the Committee has concluded that changes in the law are essential. The prohibition on furnishing information regarding race, religion, or national origin would, if vigorously enforced, impair the ability of foreign countries and their nationals to discriminate against U.S. companies and impede their ability to enlist other U.S. companies in those efforts.

Similarly, the prohibition on refusals to do business pursuant to a boycott demand would seriously impair the ability of foreign governments to dictate business relationships among U.S. firms. U.S. firms would not be free legally to submit to foreign domination in the choice of persons with whom they deal, and foreign nations would be put on notice that the U.S. Government will not tolerate such interference with its sovereignty.

The Committee is sensitive to the difficulty of enforcing prohibitions on refusals to deal. The absence of business dealings without evidence of motive is obviously not proof of prohibited conduct. The danger of unwarranted allegations in this highly sensitive area has prompted the Committee to leave enforcement in the hands of the Executive Branch instead of creating a private right of action. In addition, any person accused of an illegal refusal to deal would be entitled to full agency hearing on the record in accordance with provisions of the Administrative Procedure Act.

4. Penalties

By increasing from $1,000 to $10,000 the penalties which may be imposed for violations of the anti-boycott provisions of the Act, and by making it clear that existing law permits suspension or revocation of export privileges for a violation of such provisions, the bill would give significantly greater meaning and potential effectiveness to the anti-boycott provisions of the Act.

Present practice and existing limitations on penalties render them practically worthless in securing compliance. A $1,000 fine is of little significance to a multi-million dollar company. The problem is exacerbated by the practice of issuing warnings to first offenders. The failure to suspend or revoke a firm's export privileges for a violation of anti-boycott law, despite adequate authority to do so, undermines enforcement efforts further. Increased monetary penalties and vigorous enforcement efforts, would significantly enhance the incentives for compliance with U.S. anti-boycott law.

5. Disclosure of Charging Letters

By requiring public disclosure of charging letters or other documents initiating proceedings for enforcement of the anti-boycott provisions of the Act, the bill would give the public as well as aggrieved persons an opportunity to come forward with evidence bearing on allegations of illegal conduct. In addition, it would provide a means of scrutinizing the enforcement efforts of the Executive Branch. The present practice of keeping such proceedings secret impedes the

gathering of all relevant evidence and deprives the public of an opportunity to assess the seriousness and vigor of enforcement action.

6. Reports to the State Department

By requiring the Commerce Department to report periodically to the State Department on the information disclosed in the boycott reports, the bill would establish a mechanism for focusing State Department attention on the nature and magnitude of boycott problems and generating intensified efforts to bring an end to foreign boycotts. Those engaged in U.S. diplomatic efforts relating to foreign boycott activities should be fully cognizant of how such boycotts operate and the impact they have on U.S. citizens. The Commerce Department is in a position to assist in generating such understanding by making information on the boycott available to the highest levels of government.

7. Reports to Congress

By requiring that the semi-annual reports to Congress under the Act include an accounting of action taken by the President and the Secretary of Commerce to effect U.S. anti-boycott policy, the bill would provide the Congress with a better picture of the precise measures taken and the earnestness of the President's efforts to carry out U.S. anti-boycott policy.

8. Application of the Act to export intermediaries

Finally, by clarifying the Act to remove any doubt that it applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies, the bill would bring within the Act parties which are often central to the implementation of a boycott. Since banks and other intermediaries often certify that the exporter has met all boycott requirements, they are in a unique position to enforce foreign boycott efforts.

Present law makes no exemption for banks and other export intermediaries. By its express terms it applies to all domestic concerns. Yet, with official blessing, U.S. banks, shipping companies, and other intermediaries have traditionally regarded themselves as exempt from the law. As a result, the public has been deprived of essential information regarding the workings of the boycott. The continued exemption of export intermediaries from the requirements of the Act would leave a significant section of the economy free from U.S. anti-boycott law. The bill would preserve the original intent that the law apply to *all* domestic concerns.

In proposing these changes in the law, the Committee wishes to emphasize that nothing in the bill which directs specific anti-boycott measures is intended to limit the President's authority to take other measures within his authority to effect the anti-boycott policy of the Act. Efforts which the Administration has recently taken in this area are welcome although overdue. Further efforts, including effective implementation of the provisions of this bill upon enactment, are encouraged.

Investment Disclosure

Foreign investment in the United States has grown dramatically in recent years. Devaluation of the dollar, a depressed U.S. stock market,

inflation abroad, market opportunities in the United States, shortages of raw materials, and the growing accumulation of monetary surpluses among oil-producing states have combined to produce an increasing flow of investment funds to the United States.

Since 1960, foreign direct investment in the United States has grown at a rate of over $600 million per year. The Department of Commerce estimates that by year-end 1974 the value of foreign direct investment [19] in the United States stood at $21.7 billion compared to $6.9 billion in 1960, a gain of 200 percent in the fourteen year period. Foreign portfolio investment during the same period grew by 247%. At the end of 1974, the total stood at $47.9 billion, compared to $13.8 billion in 1960.

Attitudes toward the growth of foreign investment in the United States are ambivalent. On the one hand it is recognized that foreign direct investment can strengthen the economy by enhancing competition, by improving the productivity and efficiency of industry through fresh infusions of management and technology, and by improving the balance of payments through new capital inflows, import substitution, and increased export sales. Foreign portfolio investment, too, benefits the economy because it tends to improve the balance of payments, strengthen the value of the dollar, increase capital availability, and lower domestic interest rates.

On the other hand, foreign investment, whether direct or portfolio, can be a vehicle for gaining control of essential industries, securing control of sources of materials in short supply, gaining access to high technology, and increasing industrial concentration through the consolidation of large foreign and domestic enterprises.

Of immediate concern in light of continuing tensions in the Middle East and the accumulation of vast sums in the hands of OPEC (a $60 billion surplus in 1974; $40 billion in 1975) is the possibility that foreign investment from Arab sources will be manipulated for political purposes. The Treasury Department estimates that during the first nine months of 1975, $3.5 billion, or 75 percent, of all the foreign portfolio investment in the United States came from OPEC sources. Such investment could constitute a powerful economic weapon should the Arab states attempt to employ it to achieve political ends.

At present, the formulation of sound national policy on foreign investment is seriously handicapped by shortcomings in data-gathering capability. There is currently no systematic and centralized mechanism for regularly gathering accurate information on the size and source of foreign investment flows. Instead we rely largely on periodic "benchmark" surveys every ten years or so based on sample surveys of selected U.S. firms.[20] As a result, available information provides little more than estimates of actual conditions. As the Federal Energy Administration said in its 1974 Report on Foreign Ownership, Control, and Influence in Domestic Energy Sources and Supply:

> [F]or the most part, identification of foreign investment in U.S. energy sources and supplies must depend on incom-

[19] Defined as ownership of 25 percent or more of a corporation's equity securities. All other foreign investment is classified as portfolio investment.

[20] For a description of current procedures see U.S. Treasury Department, *Interim Report to the Congress on Foreign Portfolio Investment in the United States* 77–85 (October 1975) and U.S. Department of Commerce, *Interim Report to the Congress on Foreign Direct Investment in the United States* 17 (October 1975).

plete and inconsistent data series. The requirements for corporate ownership disclosure under existing federal laws and regulations are ineffective. The identity of capital sources for Portfolio investments appears to be particularly difficult to determine, and information concerning foreign direct investment (FDI) is acknowledged to be incomplete. This is so despite the fact that existing laws require FDI to be recorded for the purpose of keeping balance of payments accounts. The U.S. Department of Commerce, Bureau of Economic Analysis (BEA), which is responsible for the collection of FDI data, has acknowledged that companies in which foreign governments have a controlling interest hardly ever observe the requirements for filing appropriate forms pursuant to the prescribed laws and regulations.[21]

The consequences are strikingly illustrated by the Treasury Department's discovery, as reported in its Interim Report to the Congress on Foreign Portfolio Investment in the United States,[22] that such investment as of the end of 1974 was $32–37 billion, or as much as 80 percent, higher than the previous estimate of $48 billion. Similarly, available data on direct investment significantly underestimates actual levels since it is based on sample surveys only and a definition of direct investment that is no longer regarded as appropriate.[23]

Compounding the problem is the inability to identify, to any meaningful degree, those who have the power, directly or indirectly, to influence the affairs of U.S. corporations. While many federal agencies collect data on individual investors,[24] a study commissioned by the Council on International Economic Policy and the Office of Management and Budget observed that "no single agency either coordinates, compiles, or discloses to the public a full picture of foreign investment in the U.S. . . .; there are only limited instances where investors are identified by nationality . . .; [and while] [i]dentification of the 'beneficial' owner is often regulated by the Federal agency . . . it is usually only provided when such information is known and available to the reporting entity".[25]

As a consequence, neither companies nor their shareholders have the information needed to protect their interests, and neither the regulatory agencies, the Executive Branch, nor the Congress has adequate information for the development of sound public policy. Debate over measures to regulate or control foreign investment or to prevent undue concentration of corporate control thus takes place under a cloud of serious informational deficiencies.

One of the principal problems in obtaining accurate information is the practice of recording stock ownership in other than the name of the beneficial owner through "nominee" or "street name" accounts.

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[21] Federal Energy Administration, Report to the Congress on Foreign Ownership, Control and Influence on Domestic Energy Sources and Supply 1–2 (December 1974).

[22] U.S. Treasury Department, *Interim Report to Congress*, *supra* note 20.

[23] To date, an investment has been considered a "direct" investment if it represented 25 percent or more of a company's equity security. In the new benchmark survey being prepared pursuant to the Foreign Investment Study Act of 1974 (Public Law 93–479) the 25 percent test is reduced to 10 percent or more.

[24] U.S. Council on International Economic Policy and U.S. Office of Management and Budget, *Report on United States Data Collection Activities with Respect to Foreign Investment in the United States* 5–6 (February 1975).

[25] *Ibid.*

Nominee accounts are typically used by institutional investors (e.g., insurance and investment companies) and financial intermediaries (e.g., banks and trust companies) to register in the name of a third person securities held by them for their own accounts or the accounts of their customers. This is done to facilitate trading or other transactions in the stock. Street name accounts are used for the same purpose, typically by brokers, who register securities held for themselves or their customers in their own names or in the name of a nominee.

A report issued by the Senate Committee on Government Operations on the disclosure of corporate ownership shows how the widespread use of nominee or street name accounts poses serious obstacles to determining who owns and controls American corporations. According to the Report, for example, 26 of the 30 largest shareholders of Mobil Oil Corporation were nominees at the time of the Report. Similarly, 28 of the 30 largest shareholders of Ford Motor Company were nominees. In United Airlines Corporation, 28 nominees held 45.1% of that company's outstanding stock.[26] Identification of who actually owns and controls the corporation is virtually impossible under these circumstances.

While there are sound reasons for use of street and nominee names to facilitate securities transactions, their widespread use raises a number of problems both for investors and for the formulation of public policy. For one thing, street name and nominee accounts impose one or more layers between the issuer and the beneficial owner thereby making issuer-shareholder communications more difficult and expensive. The issuer is often precluded from contacting the beneficial owner directly, a matter of potentially significant import in tender-offer situations, and the beneficial owner often finds it difficult to exercise the prerogatives or receive the benefits of stock ownership directly. Both must act through one or more intermediaries. For another, street name and nominee accounts impede public access to information regarding the control of publicly held corporations and make it possible for power and influence to be exercised with relative anonymity.[27]

As the Government Operations Committee Disclosure of Corporate Ownership points out: "The existence of sizable blocks of stock held in the name of one or more nominees of a bank gives that bank considerable power in the way it exercises the voting rights it has itself and the influence it is in a position to exert on beneficial owners where it occupies an agency role." [28] Yet the public, and indeed the corporation, have no effective means of identifying the existence of such potential influence.

Surveys of seventy-four major U.S. companies by the Senate Government Operations Committee concerning the identities of their top thirty shareholders revealed that Chase Manhattan held 2 percent or more of the stock in more than half the companies; Morgan Guaranty and First National City Bank held 2 percent or more of the stock in

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[26] Senate Comm. on Government Operations, *Disclosure of Corporate Ownership,* 30, 35, 36, 55, and 56, 93d Cong., 1st sess. (1973). For an analysis of pertinent data on corporate ownership and control, *see also* Senate Comm. on Government Operations, *Corporate Ownership and Control,* 94th Cong., 1st sess. (1975).

[27] *See generally* Securities and Exchange Commission. Preliminary Report to the Congress on the Congress on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities (December 1975).

[28] Senate Committee on Government Operations, *Disclosure of Corporate Ownership, supra* note 26, at 136.

almost one-third of the companies; and Bankers Trust held 2 percent or more of the stock in almost one fourth of the companies.[29] As a study by the House Banking and Currency Subcommittee on Domestic Finance observed: "Control of a small block of stock in a widely held company by a single or few like-minded financial institutions provides them with disproportionately large powers within the company" and "even 1 or 2 percent of stock in a publicly-held corporation can gain tremendous influence over a company's policies and operations.[30]

Faced with these problems and in light of measures being advanced in various quarters to reverse America's traditional open door policy toward foreign interest, the Committee has recommended in Title II of S. 953 legislation which will make a significant contribution towards filling the information gaps which presently surround the question of who owns and controls American corporations. Rather than recommending new controls on foreign investment at this time, the Committee is recommending a mechanism for securing on a regular and systematic basis accurate and up-to-date information on the ownership of U.S. corporate securities, without regard to whether the investment is from a foreign or domestic source. In that regard, no discrimination would be imposed against foreign investors.

The availability of timely and accurate information will make it possible in the future to assess U.S. policy toward foreign investment on a continuing basis with information that is essential to the intelligent formulation of sound policy. In the meantime, the U.S. open door policy toward investment from abroad will remain in effect unless and until events make it clear that revisions in such policy are warranted.

Title II of S. 953 attacks the problem of inadequate investment information in two ways: First, it would amend section 13(d)(1) of the Exchange Act to require any person who acquires more than 5 percent of any class of the described class of securities to disclose the residence, nationality and nature of the beneficial ownership of the purchaser as well as the background and nationality of each associate of the purchaser who has a right to acquire additional shares of the issuer. (For these purposes, the term "nationality" refers to citizenship.) Those who beneficially own more than 5 percent of a corporation's equity securities or make a tender offer for corporate securities are already required to disclose such information as the identity and background of the purchaser, the source and amount of the consideration, and the purpose of the purchase.

Disclosure of the citizenship of the purchaser or person making a tender offer will make it possible to measure the extent to which foreign investors have acquired or seek to acquire controlling or potentially controlling interests in U.S. corporations without discriminating against them or imposing on them any additional burdens. Disclosure of the nature of the beneficial ownership will make it possible to determine the degree of control or potential control represented by persons owning more than 5 percent of a company's securities. An investor who merely has the right to receive dividends, for example, is far less significant from the standpoint of corporate control than one who has full voting rights with respect to his securities.

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[29] *Id.* at 24–26.

[30] Staff of Subcommittee on Domestic Finance, House Committee on Banking and Currency, *Commercial Banks and Their Trust Activities; Emerging Influence on the American Economy*, 90th Cong., 2d sess. (1968).

The second way in which Title II attacks the problem of disclosure is by enlisting the aid of recordholders in securing public disclosure of essential information regarding the ownership and control of U.S. corporate securities. This is accomplished by the new section 13(g) which would be added to the Exchange Act to require every recordholder of, and any other person having an interest in, two percent or more of any class of described in section 13(d)(1) to disclose such interest and such other ownership information as the SEC may by rule prescribe. The SEC would be given discretion to prescribe the form and content of the ownership reports and the manner and the frequency with which they are to be filed and disseminated, although reporting could not be required more often than quarterly.

In this connection, new section 13(g)(1) of the Exchange Act would also give the SEC power to determine the method for computing the reporting threshold. It is contemplated by the Committee that reports would be filed by recordholders and others on an aggregate basis where, for example, an institution uses more than one nominee of record. In this case, the Commission would require the reporting entity (bank or broker-dealer) to file based upon the cumulative holdings of these multiple accounts. Similarly, all securities owned by a person, regardless of the nature of that ownership, may be required by the SEC to be aggregated in computing how many securities the person owns for purposes of determining whether he would be required to report. In other contexts, aggregation may not be necessary and reporting may be required on an individual account basis. In each case the SEC must be governed by the statutory purpose and the regulatory need.

Although these new reporting requirements would be applicable initially to persons having an interest in 2 percent or more of a corporation's securities, the threshold would be reduced to one percent on September 1, 1976 and to one half of one percent on September 1, 1977. However, the SEC would have discretion to shorten or extend these periods if, after considering certain matters set forth in the bill, it finds that such action is not inconsistent with the protection of investors or the public interest.

Among the matters which the SEC would be required to consider are (1) the extent to which beneficial owners are avoiding reporting requirements through the use of street name or nominee accounts or multiple holders of record; (2) the cost of compliance to issuers and recordholders; (3) the effect on the securities markets, including the system for the clearance and settlement of securities transactions; (4) the benefits to investors and to the public; (5) the bona fide interests of individuals in the privacy of their financial affairs; (6) the extent to which such reported information gives or would give any person an undue advantage in connection with acquisitions or takeovers; (7) the need for such information in connection with the administration and enforcement of the Securities Exchange Act; and, (8) such other matters as the SEC may deem relevant, including the results of any study or investigation it may undertake such as the "street name" study currently being conducted pursuant to section 2(m) of the Exchange Act and the results of reports filed by institutional investment managers pursuant to section 13(f) of that Act.

New section 13(g) of the Act would make it unlawful for any person to make use of the mails or instrumentalities of interstate commerce

to effect transactions in any security of a class described in section 13 (d) (1) if such person knew or should have known that the person effecting the transaction, or any person on whose behalf such a transaction is intended to be effected, has not disclosed such information as the SEC may, by rule, require to be filed, published or disseminated pursuant to the bill. The SEC would be authorized, however, to grant exemptions, by rule or order, if it finds that such exemption is not inconsistent with the public interest or the protection of investors.

The SEC would be required to report to the Congress on August 1, 1976 and August 1, 1977 on the steps it has taken to implement, accelerate or defer reduction of the initial two percent threshold. In addition, the SEC would be required to report to the Congress no later than January 2, 1978, on the feasibility and desirability of reducing the reporting threshold to one-tenth of one percent. The SEC's comments on this procedure are set forth in the following letter:

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., December 12, 1975.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, the Commission recently forwarded its comments regarding Title II of the Proposed Senate Draft Bill to amend the Export Administration Act of 1969 and the Securities Exchange Act of 1934. Essentially, we asked that you consider a procedure whereby the Commission initially would be required to secure disclosure of the interests of all stockholders owning 2% or more of the outstanding stock of all publicly held companies. Recognizing your Subcommittee's concern that a broader reporting requirement may better serve the public interest, we suggested that the 2% reporting threshold be reduced at regular intervals down to a mandatory disclosure threshold of ½ of 1% ownership. Each step would be required to be taken unless the Commission found, in accordance with prescribed statutory standards, that such lower reporting threshold would not be in the public interest.

In our earlier transmittal letter, we pointed out that we are studying the issue of beneficial ownership and that we presently have no basis for making a final determination as to the kinds of disclosure that may be necessary or appropriate, and the kinds of burdens that such disclosure may entail. Notwithstanding this point, however, we do recognize your Subcommittee's concern for immediate action. Accordingly, we believe that the suggestions we have made provide a satisfactory means of meeting the Subcommittee's concerns and still affording an opportunity for further Commission consideration of these issues.

Sincerely,

RODERICK M. HILLS,
Chairman.

In the course of its deliberations the Committee considered recommending enactment of new statutory penalties in order to insure effective enforcement of the new reporting requirements, particularly with

respect to their application to foreign persons. Personal jurisdiction over foreign persons who fail to comply with the law is difficult, if not impossible, to obtain. However, the Committee concluded that the *in rem* jurisdiction of the courts, together with the equitable forms of relief which they are presently empowered to apply in such matters, is adequate to insure effective enforcement. These include such remedies as restrictions on transfers of securities, revocation or suspension of voting rights, impoundment of dividends, and divestiture. The Committee believes that these remedies, together with the general equitable power of the courts to fashion appropriate remedies, can and should be used against foreign persons as well as United States persons who fail to comply with the Act and that, therefore, the specification of statutory penalties is unnecessary.

The disclosure approach of Title II with its built-in flexibility will make possible a continuing assessment of foreign investment and corporate ownership issues. Such an approach will encourage international investment while insuring the availability of the facts necessary to protect vital national interests.

Public policy in support of enhanced disclosure in securities transactions follows a pattern which began with the Securities Acts of 1933 and 1934. This legislation will complement continuing efforts within the Executive Branch, the regulatory agencies, and the Williams Securities Subcommittee to increase the availability of information which is vital to the development of sound policy in this complex area where important national and international issues are at stake.

SECTION-BY-SECTION ANALYSIS OF THE BILL

TITLE I—FOREIGN BOYCOTTS

SHORT TITLE

Section 101 of the bill would provide that Title I of the bill may be cited as the Foreign Boycotts Act of 1975.

STATEMENT OF POLICY

Section 102(a) of the bill would amend section 3(5)(A) of the Export Administration Act of 1969 (the "Act") 50 USCA App. § 2402(5) (Supp. 1975) to make it clear that it is U.S. policy to oppose foreign boycotts when directed against domestic concerns as well as when directed at countries friendly to the United States. Section 3(5)(A) of the Act presently states that it is U.S. policy "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . ." Since the Arab boycott includes a boycott of blacklisted U.S. firms as well as the State of Israel, amplification of the present statutory statement of policy will make it clear that the United States opposes attempts to extend foreign boycotts to its own internal affairs.

IMPLEMENTATION OF U.S. ANTI-BOYCOTT POLICY

Section 103 of the bill would reorganize subsection 4(b) of the Act to place all express boycott implementation provisions in a new paragraph 4(b)(2), transferring existing boycott provisions from paragraph 4(b)(1), and redesignating existing paragraphs (2) through (4) thereof as new paragraphs (3) through (5).

New subparagraph 4(b)(2)(A) would require that the Secretary of Commerce, through appropriate rules and regulations, implement the anti-boycott policy of the Act. This merely carries forward a similar provision in paragraph 4(b)(1), although the wording of this new provision is intended to make it clear that the Committee expects full implementation of the anti-boycott policy of the Act.

(a) *Disclosure of Foreign Boycott Demands.* New subparagraph 4(b)(2)(B) carries forward the requirement of existing law that firms which receive requests for the furnishing of information, the signing of agreements, or the taking of any other action which has the effect of furthering or supporting a foreign boycott report that fact to the Secretary of Commerce, together with such other information concerning such request as the Secretary may require for such action as he may deem appropriate for carrying out the purposes of U.S. anti-boycott policy.

Subparagraph 4(b)(2)(B) would further require that firms receiving such requests also report to the Secretary of Commerce on

whether they intend to comply and whether they have complied with such requests. In addition, any such reports made after enactment of the bill would be required to be made available promptly for public inspection and copying. However, information regarding the quantity, description, and value of any goods to which such reports relate may be kept confidential if the Secretary determines that disclosure thereof with respect to any particular domestic concern would place that concern at a competitive disadvantage.

Subparagraph 4(b)(2)(B) would also require that the Secretary of Commerce report the results of these boycott reports to the Secretary of State on a periodic basis for such action as he, in consultation with the Secretary of Commerce, may deem appropriate for carrying out the anti-boycott policy of the Act.

(b) *Prohibition on Supplying Certain Information Pursuant to Boycott Requests.* Subparagraph 4(b)(2)(C)(i) would require that rules and regulations implementing the anti-boycott policy of the Act also prohibit domestic concerns from furnishing information regarding the race, religion, or national origin of their own or any other domestic concern's directors, officers, employees or shareholders to, or for the use by, any foreign country, national, or agent thereof where such information is sought for purposes of enforcing a foreign boycott.

The Committee recognizes that there may be occasions where such information is sought for purposes other than enforcement of a foreign boycott. Enforcement of foreign civil rights or foreign investment disclosure laws, for example, might require disclosure of such information by a U.S. company. However, where such information is sought for purposes of determining whether a U.S. company should be placed on or removed from a blacklist or for purposes of determining whether a U.S. firm is doing business with other U.S. firms which are or might be blacklisted, or where such information is sought for any other purpose connected with enforcement of a boycott, the prohibition would apply.

(c) *Prohibition on Refusals to Deal.* Subparagraph 4(b)(2)(C)(ii) would require that rules and regulations implementing the anti-boycott policy of the Act also prohibit domestic concerns from refusing to do business with any other domestic concern or person pursuant to an agreement with, requirement of, or a request from or on behalf of any foreign country, national, or agent thereof where such agreement, requirement, or request is made or imposed for the purpose of enforcing or implementing a foreign boycott. Any civil penalty (including any suspension or revocation of a firm's authority to export) for a violation of this prohibition could be imposed only after notice and an opportunity for an agency hearing on the record in accordance with sections 5 through 8 of the Administrative Procedure Act.

Penalties

Section 104(a) of the bill would increase the civil penalty which may be imposed under the Act for violations of its anti-boycott provisions from $1,000 to $10,000. Such penalty may be imposed in addition to or in lieu of any other liability or penalty which may be imposed under the Act.

Section 104(a) of the bill would also make it clear that export license privileges may be suspended or revoked for violations of the anti-boycott provisions of the Act. The authority to suspend or revoke export privileges for any violation of the Act already exists under present law and, thus, it extends to violations of the anti-boycott provisions of the Act. However, the Committee wishes to emphasize that its use in cases of violations of such provisions may make a significant contribution to effective enforcement of U.S. anti-boycott policy, and that accordingly, the Committee encourages its application in circumstances which will help achieve that end.

Disclosure of Charging Letters

Section 104(a) of the bill would also require that any charging letter or other document initiating proceedings by the Secretary of Commerce after enactment of the bill for the imposition of sanctions for violations of the anti-boycott provisions of the Act be made available for public inspection and copying.

Technical Change

Section 104(b) of the bill would amend section 7(c) of the Act to conform it to the public disclosure requirements imposed by the bill Section 7(c) currently provides that "[n]o department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest." Since the bill would require that certain reports and documents be made public, section 104(b) of the bill would provide that section 7(c) of the Act applies "except as otherwise provided."

Reports to Congress

Section 105 of the bill would add a new paragraph (3) to subsection 10(b) of the Act to require that each report to the Congress by the Secretary of Commerce under the Act also contain a description of actions taken by the President and the Secretary to effect the anti-boycott policy of the Act.

Definitions

Section 106 of the bill would amend section 11 of the Act by adding a definition of the term "domestic concern" as used in the Act. As so defined, the term would include but not be limited to banks, other financial institutions, insurers, freight forwarders, and shipping companies organized under the laws of the United States.

The Committee does not intend to include the Export-Import Bank within this definition however. The Bank is excluded under the assumption, confirmed by the Bank to the Committee, that it does not participate in transactions which involve boycott demands.

TITLE II—INVESTMENT DISCLOSURE

SHORT TITLE

Section 201 of the bill would provide that Title II of the bill may be cited as the Domestic and Foreign Investment Improved Disclosure Act of 1975.

DISCLOSURE OF RESIDENCE, NATIONALITY, AND NATURE OF BENEFICIAL OWNERSHIP

Section 202 of the bill would amend section 13(d)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") to expand the disclosure requirements applicable thereunder to persons who acquire more than 5% of an equity security registered with the Securities and Exchange Commission ("SEC") or who propose to acquire such securities through a tender offer to include disclosure of (a) the residence, nationality, and nature of the beneficial ownership of the person acquiring the securities and all other persons by whom or on whose behalf the purchases have been or are to be effected and (b) the background and nationality of each associate of the purchaser who owns or has a right to acquire additional shares of the issuer.

For these purposes, the term "nationality" refers to citizenship. The term "nature of the beneficial ownership" could include such matters as whether the beneficial owner has the right to direct the voting of the securities, the receipt of dividends, the proceeds of sale or such other or different indicia of beneficial ownership as the SEC may prescribe.

DISCLOSURE BY RECORD AND OTHER HOLDERS

Section 203 of the bill would add a new subsection 13(g) to the Securities Exchange Act of 1934. Paragraph (1) thereof would require that every holder of record of, and any other person having an interest in, 2% or more of, any security of a class described in section 13(d)(1) of the Exchange Act, report such interest and such other information, in such form and at such intervals (but in no event more frequently than quarterly) as the SEC may by rule prescribe.

Paragraph (2) thereof would provide that any person required to make reports pursuant to paragraph (1) of this new subsection file, publish, or disseminate such reports in such manner and to such persons as the SEC may by rule specify. Paragraph (2) would also require that any issuer which receives reports pursuant to this paragraph include in any filing or registration statement it makes with the SEC such of the information contained in such reports as the SEC may by rule prescribe.

Paragraph (3) thereof would require that the 2% threshold of paragraph (1), be reduced to 1% on September 1, 1976 and to ½ of 1% on September 1, 1977. However, the SEC may shorten or extend such periods if it finds that such change is not inconsistent with the protection of investors or the public interest after giving appropriate consideration to, and receiving public comments, views, and data on the following:

(a) the incidence of avoidance of reporting by beneficial owners using multiple holders of record:

(b) the cost of compliance to issuers and to record holders;

(c) the effect on the securities markets of such action, including the system for the clearance and settlement of securities transactions;

(d) the benefits to investors and the public;

(e) the bona fide interests of an individual in the privacy of his financial affairs;

(f) the extent to which such reported information gives, or would give, any person an undue advantage in connection with tender offers or other acquisitions;

(g) the need for such information in connection with the administration and enforcement of the Exchange Act; and

(h) such other matters as the SEC may deem relevant, including the results of any study or investigation it may undertake pursuant to the '34 Act and the information obtained pursuant to section 13(f) of that Act.

Paragraph (3) of new subsection 13(g) would also require the SEC to report to the Congress on August 1, 1976, and again on August 1, 1977, on the steps it has taken, or plans to take, to implement, accelerate, or defer the time periods set forth in this paragraph. In addition, the SEC would be required to report to the Congress no later than January 2, 1978 on the feasibility and desirability of reducing the specified thresholds to one-tenth of 1 per centum, after studying the impact of such reduction on a reasonable sample of issuers, recordholders, and other persons required to report under new subsection 13(g) and after full consideration of the matters to be considered in deciding whether to extend or shorten the periods specified in this paragraph for reduction of the specified thresholds.

Paragraph (4) of new subsection 13(g) would give the SEC the authority, by rule or order, to exempt from the requirements of this new subsection any security, issuer, or person, or any class of securities, issuers, or persons, if it finds that such exemption is not inconsistent with the public interest or the protection of investors.

Paragraph (5) of new subsection 13(g) would make it unlawful for any person, in contravention of such rules as the SEC may prescribe, to make use of the mails or any other means or instrumentality of interstate commerce to effect any transaction (for his own account or the account of another) in any security subject to this new subsection if such person knew, or should have known, that information required to be filed, published, or disseminated in accordance with this subsection, either by the person effecting the transaction or by the person on whose behalf, directly or indirectly, the transaction is intended to be effected, has not been filed, published, or disseminated.

Paragraph (6) of new subsection 13(g) would require that the SEC, in exercising its authority under this subsection, take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the regulatory agencies referred to in section 34(D) of the Exchange Act and other Federal authorities which, directly or indirectly, require reports substantially similar to that called for by this subsection to achieve uniform, centralized reporting of such information and avoid unnecessary duplicative reporting by, and minimize the compliance burden on, persons required to report.

Fiscal Impact Statement

In accordance with section 252(a) of the Legislative Reorganization Act of 1970, the Committee estimates that Title I of the bill will result in no increase in the cost of administering the Export Administration Act inasmuch as the provisions of the bill can be carried out with existing staff. It is estimated that Title II would cost approximately $50,000 per year for additional staff to receive and process the reports required by the bill.

Changes In Existing Law

In the opinion of the Committee, it is necessary to dispense with the requirements of subsection 4 of Rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS OF SENATORS TOWER, HELMS, AND GARN

We are very concerned over the adoption of title II of this bill. In our opinion, the need for this legislation has not been demonstrated. Its obvious intent is to improve disclosure of both foreign and domestic corporate stock ownership, but at what cost? We believe the costs will be great, not only in terms of financial expenditures required, but also in the reduction of individuals' rights to privacy. We believe the primary question is, "At what level of corporate ownership disclosure is the public interest served?" This question simply has not been answered nor have benefits to be derived from broader disclosure been adequately presented. We believe the benefits to the public from such disclosure are illusive at best.

We support section 202 of the bill which amends section 13(d) of the Securities Exchange Act to basically require disclosure of the background and nationality of individuals who are beneficial owners of more than 5 percent of a class of any registered equity security. This modification will substantially improve our knowledge about the extent of foreign ownership in the United States.

Section 203 of the legislation, however, proposes to drop the required disclosure level immediately from 5 percent to 2 percent, and to one-half of 1 percent by September 1, 1977. We firmly believe that there has not been adequate evidence presented to warrant such a dramatic reduction. We are not convinced that 2 percent or one-half of 1 percent is of practical public significance to measuring the degree of substantial corporate control which either foreign or domestic investors can exercise. Can individuals owning one-half of 1 percent exercise substantial control over the policies or practices of domestic corporations such that their operations would be decidely in opposition to the U.S. national interest? We think not.

One benefit alluded to during the hearings was that the legislation would better enable corporations to communicate with their shareholders. If there is a need for better communication, then the study presently being conducted by the Securities and Exchange Commission, to examine the adequacy of the communication system between the corporation and the stockholder, should provide a basis for reaching an acceptable solution to this problem. We do not believe that it is in the national interest for Congress to proceed pellmell to codify new sweeping disclosure requirements and regulations which will be expensive and will intrude on an individual investors' right to privacy. In addition, we believe that those groups or individuals who may derive benefits from increased disclosure should shoulder some of the costs. The taxpayer should not be asked to subsidize this activity.

Another benefit deriving from this legislation which was vaguely referred to during the hearings was that it would assist Federal regulatory agencies in detecting violations of Federal law. Again no affirm-

ative testimony was given by our Federal regulatory agencies as to the need for the desirability of such new legislation.

Evidence indicates that the costs of collecting and processing this information will not be inconsequential to financial intermediaries or to Federal regulatory agencies. In our opinion it has not been demonstrated that the benefits of this legislation will outweigh those costs. In the end, it is the investor and the taxpayer who will pay the cost of broader disclosure.

Perhaps the most important and least discussed issue surrounding this legislation is the possible violation of the privacy rights of an individual as stated by the fourth amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Former SEC Chairman Carrett expressed grave concern about the privacy issue raised in this legislative proposal when testifying before both the Securities Subcommittee and the International Finance Subcommittee:

> The idea of requiring fiduciaries to disclose their beneficiaries, or at least those beneficiaries with voting power, on a regular basis for public filings raises other considerations that must be carefully weighed. One is the longstanding tradition and policy in our law of protecting the privacy of private trusts. Compelling the public disclosure of the portfolios of private trusts—even if only to the extent that they hold equity securities of publicly owned U.S. companies for which the beneficiaries hold the voting power—is a fundamental departure from our settled norms. Of course, we have long since made this departure where the beneficiary is a reporting person under section 16 of the Securities Exchange Act or is otherwise a control person, or affiliate, of the portfolio company, or one who has acquired 5 percent and becomes subject to section 13(a). But we are now considering a more drastic and far-reaching departure.

The privacy rights of individual investors have also been contested and affirmed in recent court actions. The Supreme Court of California, for example, stated in the case of *City of Carmel-by-the-Sea* v. *Young*, 85 Cal. Rptr. 1, 466 P.2d 225, 231–32 (1970):

> The protection of one's personal financial affairs * * * against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within the penumbra of constitutional rights into which the Government may not intrude absent a showing of compelling need and that the intrusion is not overly broad.

We believe that no compelling need has been shown for this legislation and that its coverage is overly broad and therefore is intrusion into an individual investor's right to privacy.

The case has been made that title II of this legislation could also violate the requirements of the due process clause of the fifth amendment because there is not a reasonable relationship between the end sought to be achieved and the means employed.

As former Chairman Garrett has stated, "We are now considering a more drastic and far-reaching departure." We strongly believe that additional disclosure should be weighed carefully and enacted only when overriding regulatory purpose warrants such disclosure.

A nation loses its basic freedoms slowly. Each step appears to be for a good reason. There always seems to be a compelling argument for the Government to know something more about the private concerns of the people. Soon it is denied that certain concerns are private at all. Finally, the basic protections of individual privacy are sufficiently eroded for the Government to exercise tyrannical control. It is not surprising that the majority of American people now believe their Government is an oppressor rather than a protector.

Another troubling aspect of this legislation which has not adequately been considered is the difficult problem of enforcement in the case of foreign nominees which are subject to their local privacy laws. It is doubtful whether this legislation could be equally enforced on both foreign and domestic concerns. Any laxity of enforcement, regardless of how meritorious the intent, could result in a competitive advantage to the noncomplying foreign institution. Former SEC Chairman Garrett briefly addressed this issue when testifying before the International Finance Subcommittee:

> Another consideration is one of competitive fairness among fiduciaries—broker-dealers and trust companies and United States and foreign banks. The foreign part of the problem is not just one of even application of the law as written, but also as enforced. We have been engaged in long, and so far, futile, efforts to compel disclosure of bank customers in some countries, even for purposes of criminal investigations.

In addition, the legislation would make it unlawful for any person to effect a security transaction if he "knew or should have known" that there had been a violation of the legislation's reporting requirements by the person on whose behalf the transaction is effected. While it is not clear, this provision would appear to impose on any person performing a brokerage service a duty to make a reasonable investigation to ascertain whether a reporting violation had occurred. If so, the provision would, in our view, place an undue burden on firms performing brokerage services that could raise the costs of securities transactions and adversely affect the functioning of the securities market.

JOHN TOWER.
JESSE HELMS.
JAKE GARN.

ADDITIONAL VIEWS OF SENATORS HELMS AND GARN

We believe that it is necessary to protect U.S. firms and citizens from discriminatory actions which arise from foreign boycott practices, but we do not believe that this legislation will practically contribute to that worthwhile objective. On November 20, 1975, the President announced his antidiscriminatory policy with respect to foreign boycott practices. Departments and independent agencies subsequently took actions implementing his policy. We believe that the actions taken by the administration substantially meet the concerns raised by the committee and provide an acceptable means of coping with foreign boycotts aimed at U.S. firms or citizens. We therefore believe this legislation to be unnecessary and possibly counterproductive by further straining the already fragile trading relationship between the United States and the Arab countries.

Concerning the specific provisions of title I, we wish to present the following views:

(*1*) *Require firms to notify the Department of Commerce of action taken pursuant to a boycott related request*

Current Department of Commerce Export Administration regulations require U.S. firms to report their intentions or actions taken with respect to a boycott request. If a firm is undecided as to a course of action, it must report that fact but notify the Department of is final action within 55 business days after making the decision.

The objective of required reporting has been met; we see no need for statutory language.

(*2*) *Public disclosure of boycott reports*

We believe that public disclosure of the boycott documents filed with the Department of Commerce is not in the national interest. The problem with public disclosure is that the act of complying with the request for information is interpreted by many as willfully complying with the Arab economic boycott. That is not necessarily the case. The vast majority of U.S. firms trading with the Arab countries have no trading relationship with the State of Israel or are engaged only in routine commercial trade and therefore are not subject to the specific restrictions delineated in most boycott documents.

Compliance, then, could be misinterpreted as an implication of wrongdoing, as is succinctly stated in the foregoing report on this legislation, and could result in economic injury to innocent U.S. firms through counterboycott activities. Larger firms could avoid the law by transferring sales to Arab countries through overseas branches or subsidiaries while small businessmen without overseas operations would be forced to face possible counterboycott actions simply because they engage in legitimate trade with the Arab world.

(3) *Prohibition against the furnishing of discriminatory information pursuant to a boycott request*

Existing Export Administration regulations prohibit U.S. firms from complying with boycott requests which have the effect of discriminating against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin.

Existing regulatory language is stronger than the proposal; therefore, we see little practical consequence to codifying the provision.

(4) *Prohibit U.S. firms from refusing to do business with other U.S. firms pursuant to a boycott request*

It is our understanding that the Department of Justice is currently engaged in an intensive investigation of possible antitrust violations involving U.S. businesses cooperating with the Arab boycott. One such antitrust suit has already been filed against a U.S. firm.

We believe it extremely inappropriate at this time to modify the Export Administration Act so as to confer enforcement of antitrust violations on the Department of Commerce. They do not have the personnel or the time or the expertise to undertake such a venture.

(5) *Increase maximum civil penalty from $1,000 to $10,000 and authorize the suspension of export privileges for violation of the boycott reporting requirement*

We have no objection to raising the civil penalty, but we believe that it should be raised for all violations of the act. We do object, though, to the suspension of export license privileges only for violation of the boycott reporting requirements. The Department of Commerce has exercised its authority to withhold or suspend export licensing privileges for violation of the act since the inception of the statute in 1949. Senate report No. 31, 1st session, 81st Congress, which accompanied the Export Control Act of 1949, stated with respect to enforcement of the act, "Authority for denial of licensing privileges has always been inherent in the power to prohibit or curtail exportations."

It is our concern that this provision could throw into question the authority of the Department of Commerce to exercise the withholding of export licensing privileges for other more serious violations of the act.

We believe this provision would be of no significant benefit to the Department of Commerce to enforce the antiboycott provisions to the act.

(6) *Require public disclosure of documents initiating proceedings against U.S. firms for failing to comply with the antiboycott provisions of the act*

We have no strong objections to this provision.

(7) *Require the Department of Commerce to provide the State Department with summaries of boycott related information*

We have no objection to this provision, though we see it of little value. The State Department and the Justice Department already have access to this information if it is so desired and as a matter of policy copies of any boycott reports containing discriminatory references are automatically sent to the appropriate agencies for their evaluation.

(8) *Require that semiannual reports to Congress under the act include action taken by the executive branch to effect the boycott policy of the act*

We believe there is no need for this provision as the Department of Commerce presently reports on the administration of the antiboycott regulations in the semiannual Export Administration report.

(9) *Clarify that the act applies to banks, other financial institutions, insurers, freight forwarders, and shipping companies*

We believe this provision is unnecessary because the Export Administration regulations have been modified, pursuant to Presidential directive of November 20, 1975, to insure that related service organizations, which include banks, insurers, freight forwarders, and shipping companies, report any boycott request to the Department of Commerce.

The vast majority of the provisions contained in the antiboycott amendments to the Export Administration Act are presently being exercised through the regulatory process.

This legislation, therefore, is of little practical benefit, but its cost could be great. At a time of sensitive negotiations in the Mideast, where the United States is playing a major role as mediator, it is not in the national interest to willfully encourage confrontation. In addition, we believe that this legislation would damage trade developments in the Mideast by injecting a further element of uncertainty into existing and future business relationships.

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JAKE GARN.

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